



JOHN CORNYN

January 25, 2001

Ms. Cynthia B. Garcia  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2001-0296

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 143712.

The City of Fort Worth (the "city") received a request for the following items related to a specified traffic citation:

1. The Radar unit's calibration and maintenance records.
2. The officer's radar training certification(s).
3. The tuning fork(s) used to calibrate the radar unit and their calibration certificates.
4. The actual radar unit that was used.
5. The City of Fort Worth FCC (Federal Communications Commission) licenses.
6. List of models, makes and serial numbers of **all** radar units being used by the City of Fort Worth Police Department.

We first note that the request is directed to a named city police officer and to the Fort Worth Municipal Court. The records of the Fort Worth Municipal Court are not subject to the Public Information Act. *See* Gov't Code 552.003(1)(B) (excluding the judiciary from Public Information Act definition of "governmental body"), Open Records Decision No. 25 (1974) (judicial records not subject to predecessor of Public Information Act), *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.--San Antonio 1983, no writ). Therefore, the Fort Worth Municipal Court need not respond to this request. The request directed to a named police officer is a request to the city police department. This decision addresses only the request directed to the city police department.

You claim that the responsive information is excepted from disclosure under section 552.103 of the Government Code. You have submitted the information responsive to item 6. You relate that the city does not "maintain" the information responsive to items 1 or 2 and that

the information responsive to item 5 has not been located. You argue that the city does not need to respond to items 3 or 4 since these requested items are not "documents." We have considered your arguments and reviewed the submitted information.

Tangible physical items are not the type of information contemplated under the Public Information Act. See Gov't Code § 552.002 (defines public information), Open Records Decision No. 581 (1990) (tangible items not public information). Items 3 and 4 request the tuning fork(s) used to calibrate the radar unit, their calibration certificates and the actual radar unit that was used. The requested tuning forks and radar unit are tangible items, and are not "public information" subject to the Act. Therefore, these tangible items need not be produced in response to this request. We note that the city has provided the certificates of calibration requested in item 3. These certificates are public information and may be withheld only if an exception to disclosure is shown to apply.

You have not submitted any information which is responsive to items 1, 2, or 5. The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to an open records request. Gov't Code § 552.002(a), Open Records Decision No. 445 (1986). However, you do not indicate that the city does not have a right of possession to the information responsive to these items, you merely assert that it did not locate or does not "maintain" that information. A governmental body that wishes to withhold requested information must provide to the Attorney General a copy of the specific information requested, or a representative sample thereof, labeled to indicate which exceptions apply to which parts of the copy, no later than fifteen days after the governmental body receives the written request for information. Gov't Code § 552.301(e)(1)(D). If the governmental body does not comply with the requirements of Government Code section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. Gov't Code § 552.302. A compelling reason is demonstrated where information is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). You have not submitted the information responsive to items 1, 2, or 5 so we have no basis for finding it confidential. Section 552.103 protects only the interests of the governmental body which seeks to withhold information. Therefore, we have no choice but to conclude that the information must be released per section 552.302. If you believe the information that you have not provided to this office is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below. If information responsive to items 1, 2, or 5 exists, and the city has a right of access to it, it must be released.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. Here, the request relates to a criminal case that was pending before a municipal court at the time that the request for information was received. The request for decision was made by the office of the city attorney. We therefore presume that the city attorney's office submitted this request for decision in its role as the prosecutor of that case.

To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). We find that the submitted information relates to a case that was pending when the city received the request for information. However, absent special circumstances, where the opposing party to the anticipated litigation has had access to information, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Assuming that the opposing party has not had access to the submitted information, it may be withheld while this litigation is pending.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

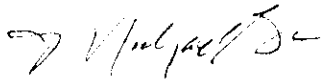
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns".

Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/er

Ref: ID# 143712

Encl: Submitted documents

cc: Mr. Dominic A. Davis  
7109 Woodhinge Drive  
Benbrook, Texas 76126-4540  
(w/o enclosures)